ORIGINAL

Supreme Court, U.S.
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NO. 00-679

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

vs.

LOREAL KINZY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Attorney for Respondent

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39 pp

On behalf of the respondent, Loreal Kinzy, counsel of record asks leave to file the attached brief in opposition, without prepayment of costs and to proceed *in forma pauperis*. Kinzy has been granted leave to so proceed in the Washington Superior Court, Washington Court of Appeals, and Washington Supreme Court.

Dana M. Nelson, a staff attorney at Nielsen, Broman and Associates, informed me that on November 14, 2000, she mailed to Kinzy at her current address two copies of an affidavit in support of the motion to proceed in forma pauperis, in the form prescribed by Rule 4 of the Federal Rules of Procedure. Nelson further informed me that she spoke with Kinzy by telephone on November 22nd, 2000, and that Kinzy indicated that she had received the affidavit and planned to fill it out appropriately with the proper notarization and have it returned to Nielsen, Broman & Associates in time to mail it with the brief in opposition. For unknown reasons, Kinzy has been unable to do so.

In light of Kinzy's expressed desire to complete the affidavit, I anticipate only a short delay in receiving the document and then forwarding it to the Court.

DATED this 27th day of November, 2000.

Respectfully submitted,

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STATE OF WASHINGTON,

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Washington Supreme Court correctly conclude that Respondent's Fourth Amendment rights were violated when she was seized by police as she was walking on the sidewalk of a major downtown Seattle street at 10:00 p.m. on a weeknight, where police claimed they stopped her out of concern for her safety due to her youthful appearance and location in an area known for drugs on a school night, but where she did not appear to be in any distress and the police did not suspect her of any criminal activity?

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OPINIONS BELOW

The Washington Court of Appeals decision affirming Respondent Loreal Kinzy's conviction is reported at State v. L.K., 95 Wn. App. 686, 977 P.2d 39 (1999), and attached as Appendix A. The Washington Supreme Court's decision reversing Kinzy's conviction is reported at State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000), and attached as Appendix B.

STATEMENT OF THE CASE

At 10:10 p.m. on March 3, 1998, Seattle Police Officers Jennings, Ness and Kim saw Loreal Kinzy walking in downtown Seattle with two other young women and a man. Appendix A, at 2; Appendix B, at 3. The police did not observe any suspicious behavior and did not suspect Kinzy of any criminal activity. Appendix A (dissent), at 1-2; Appendix B, at 6. Although Kinzy and the three others did not appear to be in any distress, the officers decided to stop Kinzy for "her safety" because she had a youthful appearance and was in an area known for drugs at ten o'clock on a school night. Appendix A (dissent), at 2; Appendix B, at 6; Appendix B (concurrence), at 1-2.

Although Kinzy was nearly 17 years old at the time, the officers thought she looked between the ages of 11 and 15. Appendix A (dissent),

at 1. The other three appeared to be in their early twenties. The officers recognized the man from a previous narcotics contact. Appendix B, at 3.

The officers wanted to question Kinzy regarding "why she was downtown, what her purpose was, who she was with, was she with family, was she by herself, does she know these people," etc. Appendix B, at 6. Contrary to petitioner's assertions, the officers never testified that they chose to stop Kinzy "as required by Washington's Family Reconciliation Act." See Petition for Writ of Certiorari, at 3; Appendix A, at 7; Appendix B, at 6.

All three officers approached and directed Kinzy to stop. Although Kinzy's companions stopped, Kinzy continued walking away. The officers subsequently grabbed her arm to stop her from walking. Appendix B, at 5-6. Officer Jennings admitted that by that point, he had become suspicious of criminal activity. Appendix A (dissent), at 2.

Kinzy honestly reported her age to the officers, but the officers did not believe her. Appendix B, at 3, 20. Jennings testified he wanted proof of Kinzy's age and would have continued the detention even if Kinzy had said, "I'm 16, I'm fine, I don't need your help, . . ." Appendix B, at 6-7. Contrary to petitioner's assertions, however, none of the officers testified

that they "sought to verify her identity by checking her name and date of birth in the State database." See Petition for Writ of Certiorari, at 3-4.

During the ensuing seizure, Kinzy repeatedly put her hands into her coat, despite officer requests to keep her hands in view. Claiming safety concerns, Jennings initiated a pat-down search for weapons. After instructing Kinzy to open her coat, Jennings saw what he suspected to be flakes of rock cocaine on the inside of her coat. After the flakes field-tested positive for cocaine, Kinzy admitted she had more cocaine in her bra. Appendix B, at 3.

Kinzy was charged with possessing cocaine. At the fact-finding hearing, Kinzy moved to suppress the cocaine, arguing that it was fruit of an unlawful seizure under the Fourth Amendment. Appendix B, at 2-3. The trial court nevertheless upheld the stop, finding that it was reasonable pursuant to the officers' community caretaking function. Appendix B, at 4. Kinzy was convicted as charged. Appendix B, at 7.

The Washington Court of Appeals affirmed Kinzy's conviction. Writing for the majority, Judge Agid held the stop was justified because there was no evidence it was a pretext, and "the officers were legitimately concerned for the welfare of a young girl who was out late on a school night accompanied by known narcotics users in a high narcotics trafficking

area." Appendix A, at 1. Focusing on the public's interest in preventing children's involvement with drugs, the majority held Loreal's interest in freedom from police interference was outweighed by the public's interest in having the police perform a community caretaking function. Appendix A, at 5-9.

Writing in dissent, Judge Baker would have reversed the trial court's refusal to suppress the evidence. Appendix A (dissent), at 4. The dissent reasoned that the seizure could not be justified as either a Terry[1] stop or a community caretaking stop because the officers observed (1) nothing suspicious and (2) nothing to indicate that Kinzy was "in trouble." Appendix A (dissent), at 2. After reviewing the facts, the dissent pointed out that "[n]o previous case anywhere has held that such factors, or anything close to them, justify the seizure of a citizen." Appendix B (dissent), at 1-2.

In a 5-4 opinion, the Washington Supreme Court reversed, holding that Kinzy's seizure was unreasonable and that the cocaine should have been suppressed as fruit of an unlawful seizure. Writing for the majority, Justice Smith quickly noted that Kinzy's seizure could not be justified under Terry because there was no indication of criminal activity at the time she was seized. Appendix A, at 27-28. The remainder of the majority's opinion

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[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

therefore focused upon whether Kinzy's seizure could be justified under the community caretaking exception. Appendix B, at 13-23.

At the outset of its analysis, the majority recognized that Washington case law had expanded the exception to encompass not only the search and seizure of automobiles, but also to situations involving either emergency aid or routine checks on health and safety. Appendix B, at 13-14. The court noted that the reasonableness of a search or seizure under the emergency aid function depended upon a showing of great urgency. In contrast, the reasonableness of a routine check on safety depended upon balancing the individual's interest in freedom from police interference against the public's interest in having the police perform a community caretaking function. Appendix B, at 14-15.

Before performing the balancing test in Kinzy's case, the majority laid out some general ground rules. First, when an individual has not been seized, the balancing of interests will usually favor the action taken by police. The majority reasoned that the individual's interest is minimal in the absence of a seizure. The corollary is that once a seizure has taken place, the individual's interest is no longer minimal and the balancing of interests will not necessarily favor the police action. Finally, considering the "real risk of abuse in allowing even well-intentioned stops to assist,"

the court concluded that it must act cautiously when weighing the public interest. Appendix B, at 16.

Turning to the facts of Kinzy's case, the court held the initial pre-seizure encounter was justified because Kinzy's interest was minimal at that point and because the officers may have been derelict in their duty had they not acted promptly to determine whether she needed assistance. Appendix B, at 17-18. Once the officers' grabbed Kinzy's arm, however, she was seized and her interest in being free from police intrusion was no longer minimal. Appendix B, at 20.

Balanced against Kinzy's interest was the public's interest in the safety of children. When examining the circumstances which led officers to seize Kinzy, however, the court concluded that the officers' actions were suggestive of the enforcement of a juvenile curfew law -- which Seattle does not have. Appendix B, at 20-21.

Relying on its decision in a prior case striking down a juvenile curfew law, the majority noted that it was at least questionable as to whether such laws impermissibly infringe on a minor's constitutional freedoms of association, expression and movement. Considering the questionable legality of juvenile curfew laws, the court concluded that the public's interest did not outweigh Kinzy's constitutional interests in freedom of association,

expression and movement. The majority therefore held that the officers' actions in seizing Loreal were unreasonable. Appendix B, at 21, 25-27 (citing State v. Pullman, 82 Wn.2d 794, 795 n.1, 514 P.2d 1059 (1973); State v. J.D., 86 Wn. App. 501, 511, 937 P.2d 630 (1997), review granted, 134 Wn.2d 1006, 954 P.2d 277 (1998)).[2]

Contrary to petitioner's overstated interpretation of the majority's opinion, the majority did not "conclude that a person may not be detained pursuant to the community caretaking function." See Petition for Writ of Certiorari, at 5. In discussing the sequence of events, the court stated that during the pre-seizure encounter when police suspected no criminal activity, Kinzy "should have been able to walk away and terminate the encounter." Appendix B, at 19. Although petitioner and Justice Talmadge, writing in dissent,[3] interpret this statement to mean that police may never seize an individual who they do not suspect of criminal activity without a warrant, that misinterprets the majority decision. Immediately thereafter in its opinion, the majority stated that once Kinzy was seized, the reasonableness of that seizure depended upon the balancing test. Appendix B, at 20-21. The majority then proceeded to balance Kinzy's interest against the public's,

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[2] Review in J.D. was later dismissed as improvidently granted. Appendix B, at 21 n.61.

[3] Appendix B (dissent), at 1.

ultimately concluding that Kinzy's interest prevailed. The context of the court's comments show that the majority did not rule that the community caretaking exception could never justify a warrantless detention or seizure. Otherwise, it would not have engaged in the balancing test. Appendix B, at 19-20.

REASONS FOR DENYING THE WRIT

This Court has already held that a police officer's warrantless search or seizure may be justified under the community caretaking exception, where the officer has reason to believe that the public safety is at risk. This Court has further indicated that the standard by which such searches and seizures are to be judged is reasonableness. The state courts and Circuit Courts of Appeal have had little difficulty applying these principles. Further guidance from this Court is therefore unnecessary.

Despite petitioner's assertions, there is no significant conflict between the states or the Circuit Courts of Appeal regarding the legitimacy of the community caretaking exception and that it may be used to justify warrantless searches and seizures under a variety of circumstances. The Washington Supreme Court's decision in the instant case is consistent with these holdings.

Although petitioner frames the question presented in this case as whether the community caretaking exception applies outside the context of automobile searches, the real question presented is whether the Washington Supreme Court majority struck the appropriate balance in the instant case. Because reasonableness under the Fourth Amendment is determined on a case by case basis, however, the balance struck by the Washington Supreme Court in one particular case cannot be considered a question of national public importance.

1. **Further Guidance on the Community Caretaking Exception is Unnecessary Because this Court has Already Articulated the Applicable Standard by which Community Caretaking Intrusions are to be Judged: Reasonableness.**

This Court first defined the community caretaking exception to the warrant requirement in Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). Retired Chicago police officer Chester Dombrowski had disabled his car by driving it into a guardrail. A passing motorist drove Dombrowski into town and he subsequently called the police. Two officers responded and drove with Dombrowski back to the accident scene to make out a report. Along the way, the officers came to the conclusion that Dombrowski was drunk. After taking various measurements

of the vehicle for the accident report, the officers took Dombrowski into custody and had the car towed to a garage. Cady, 413 U.S. at 435-36.

Believing that Chicago officers were required to wear their service revolvers at all times, and finding no revolver in Dombrowski's possession, one of the officers eventually drove to the garage to look for the service revolver within the disabled vehicle. Upon searching the trunk of the car, the officer discovered evidence connecting Dombrowski to a murder. Cady, at 436-37.

In determining whether the warrantless search was legal, the Court noted that the ultimate standard set forth in the Fourth Amendment is reasonableness. Cady, 413 U.S. at 439. The court also recognized that the duties of local police officers were not limited solely to the investigation of criminal activity:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady, 413 U.S. at 441. As a result, the Court had on two prior occasions validated the warrantless search of a vehicle by state officers as a valid exercise of their community caretaking functions. Cady, 413 U.S. at 441-42

(citing Harris v. United States, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); Cooper v. California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)).

In Harris, the justification for the initial intrusion into the vehicle was to safeguard the owner's property, whereas in Cooper it was to guarantee the safety of the police who held the car in custody. While recognizing that the justification in Cady was distinct, the Court nevertheless concluded the justification was just as immediate and constitutionally reasonable as those in Harris and Cooper: "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." Cady, 413 U.S. at 447.

In upholding the search of Dombrowski's car, the Court reiterated the general reasonableness standard of the Fourth Amendment, noting that a detailed formula for judging cases such as these would not be useful.

> The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, . . . , and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.

Cady, 413 U.S. at 448.

Thus in Cady, this Court already made clear that warrantless searches and seizures may be justified where the officer has reason to believe that someone's safety might be at risk. See also South Dakota v. Opperman, 428 U.S. 364, 374, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (stating that the sole justification for the warrantless incursion in Cady was that it was incident to the caretaking function of the local police to protect the community's safety). This Court has further indicated that the standard by which such searches and seizures are to be judged is reasonableness.

The state courts and courts of appeal have had little difficulty applying these principles, the state courts and the Circuit Courts of Appeal have had little difficulty applying these principles to uphold the warrantless search or seizure of an individual under a variety of circumstances, particularly where the officer believed the individual represented a danger to himself or others. Further guidance from this Court is therefore unnecessary. This Court should deny the writ.

2. There is no Discernable Conflict among the States or Among the Courts of Appeal Regarding the Legitimacy of the Community Caretaking Exception.

From California to Maine, many state supreme courts have recognized the community caretaking exception and that it may justify warrantless searches and seizures under a variety of circumstances. See,

e.g., People v. Ray, 88 Cal. Rptr. 2d 1, 11-14 (1999) (warrantless entry through open door of residence by officers, who had received report from neighbor that door had been open all day and that residence was a "shambles," was justified under community caretaking exception); Commonwealth v. Smigliano, 427 Mass. 490, 493, 694 N.E.2d341 (1998) (recognizing search or seizure may be justified where facts give rise to a reasonable belief that defendant is in need of immediate assistance); State v. Carlson, 548 N.W.2d 138, 141-42 (Iowa 1996) (forced entry into residence justified to make welfare check on a woman reported missing where it had also been reported by relatives that the woman's boyfriend was abusive and had given conflicting stories about the woman's whereabouts); State v. Konewko, 529 N.W.2d 861, 863 (N.D. 1995) (officer's opening driver's door of defendant's parked motor vehicle was justified because officer observed defendant sliding toward floor and door, and therefore probably thought defendant needed help); State v. Brown, 509 N.W.2d 69 (N.D. 1993) (though officer may be fully justified in stopping vehicle to provide assistance, stop in instant case was invalid as officer failed to provide any clear reason for thinking defendant needed assistance); People v. Davis, 442 Mich. 1, 24, 947 N.W.2d910 (1993) (holding that when the police are investigating a situation in which they reasonably believe someone

is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities); Provo City v. Warden, 844 P.2d 360, 364 (Utah Ct. App. 1992), aff'd, 875 P.2d 557 (Utah 1994) (holding that seizure under community caretaking exception not justified unless circumstances indicate a danger to life or limb); State v. Marcello, 157 Vt. 657, 658, 599 A.2d 357 (1991) (a passing motorist's tip -- "there is something wrong with that man" -- was sufficient to justify trooper's making a "public interest" stop to determine whether defendant needed assistance); State v. Green, 133 N.H., 249, 256, 575 A.2d 1308 (1990) (articulable suspicion of crime not needed where police "regulati[ing] the movements of civilians at crime scenes"); State v. Pinkham, 565 A.2d 318 (Me. 1989) (officer's observation of defendant motorist's misuse of marked lanes furnished sufficient reason to justify stop for purely safety purposes to advise defendant of his misuse; citing Cady); State v. Anderson, 142 Wis.2d 162, 417 N.W.2d 411, 413 (App. 1987), rev'd on other grounds, 155 Wis.2d 77, 454 N.W.2d 763 (1990) (setting forth test by which community caretaking seizures to be judged); State v. Harrison, 111 Ariz. 508, 509, 533 P.2d 1143 (1975) (officer justified in stopping defendant's

motor vehicle after observing left tire of defendant's vehicle "bouncing"; "the state has a valid interest in the safety of its highways for travelers").

In a number of states where its highest court has yet to address the community caretaking exception, the state's lower courts have also recognized the legitimacy of the exception. See, e.g., State v. Alexander, 124 Md. App. 258, 261-62, 721 A.2d 275 (1998) (warrantless entry of residence on Thanksgiving justified where an anonymous caller reported to police that although he believed his next door neighbor was away, his basement door was wide open, and where the responding officer corroborated the open door); Commonwealth v. Waters, 20 Va. App. 285, 291, 456 S.E.2d 527 (1995) (citing Cady, officer's stop of defendant was justified as reasonable exercise of community caretaker function where defendant's unsteady walking led to reasonable belief that aid or assistance was needed); State v. Martinez, 260 N.J. Super. 75, 78, 615 A.2d 279 (App. Div. 1992) (officer's stop justified where defendant was driving at an extremely low speed because such low speed was possibly an indication that there was something wrong with the driver or the motor vehicle, a threat to approaching vehicles, or an indication that the neighborhood is being "cased"); Ozhuwan v. State, 786 P.2d 918, 922 (Alaska Ct. App. 1990) (officer's seizure of defendant was not justified under Terry or the

community caretaking exception where defendant had parked her car legally but in an area frequently used by minors to consume alcohol).

The Washington Supreme Court's decision in Kinzy is consistent with the above listed cases. Despite petitioner's assertions, the majority did not hold that the community caretaking exception can never justify a warrantless seizure. See Statement of the Case, supra (discussing majority's opinion). On the contrary, the majority recognized that the community caretaking exception can justify warrantless searches and seizure, but that under the circumstances presented in Kinzy's case, the seizure was unreasonable. In other words, Kinzy's interest in being free from police interference outweighed the public interest in enforcing a nonexistent curfew law. Kinzy therefore does not evidence a "conflict" among the states regarding the community caretaking exception, as the petitioner contends.

The only other case petitioner cites as representing a "conflict" among the states is People v. Murray, 137 Ill.2d 382, 560 N.E.2d309, 311 (1990). According to Murray, a community caretaking function "involves no coercion or detention and therefore does not involve a seizure." Murray, 560 N.E.2d at 311. Considering the wealth of cases cited above holding that under certain circumstances, officers may be justified in conducting warrantless searches or seizures pursuant to their community caretaking

functions, the Illinois opinion appears to be an anomaly. In any event, one case standing alone does not present the kind of "conflict" among the states sufficient to create an issue of national importance.

Nor is there a significant conflict among the Circuit Courts of Appeal. See, e.g., Easyriders Freedom F.I.G.H.T.v. Hannigan, 92 F.3d 1486, 1497 (9th Cir. 1996) (police can stop any motorcyclist wearing a helmet that looks like noncomplying variety, even though cyclist commits no offense if he lacks actual knowledge that the helmet does not comply, because stop serves dual purpose of identifying individuals who intentionally violate the law, and informing riders who are unknowingly wearing noncomplying helmets that their helmets do not comply and possibly will not protect them sufficiently); United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) (citing Cady and holding that government interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighborhood is sufficiently compelling to justify warrantless intrusions under some circumstances); United States v. Brown, 64 F.3d 1083, 1086 (7th Cir. 1995) (holding that the police are not required to stand outside an apartment, despite legitimate concerns about the welfare of the occupant, "unless they can hear screams."); United States v. King, 990 F.2d 1552, 1561 (10th Cir. 1993) (officer justified in detaining defendant's motor

vehicle in order inform defendant of hazardous conditions and to advise him to stop honking); United States v. Johnson, 9 F.3d 506, 509-10 (6th Cir. 1993), rehearing denied, 16 F.3d 680, cert. denied, 512 U.S. 1212, 114 S. Ct. 2690, 129 L. Ed. 2d 821 (1994) (upholding warrantless entry of residence where circumstances indicated burglary in progress, albeit under guise of "exigent circumstances" exception); United States v. Rideau, 949 F.2d 718, 720 (5th Cir. 1991) (officers who observed the defendant standing in the middle of the road at 10:30 p.m. and who observed the defendant stumble as he stepped from the road, were justified in stopping defendant to check on his condition, under community caretaking functions); United States v. Dunbar, 470 F. Supp. 704, 706-08, (D. Conn. 1979), affirmed, 610 F.2d 807 (2nd Cir. 1979) (recognizing community caretaking exception, but holding that officer was not justified in stopping motorist he believed was lost).

In support of its argument that there is a conflict among the Circuit Courts of Appeal, petitioner cites: Unites States v. Bute, 43 F.3d 531 (10th Cir. 1994) (holding that community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches); United States v. Erickson, 991 F.2d 529 (9th Cir. 1993) (same); and United States v. Pichany, 687 F.2d 204 (7th Cir. 1982) (declining to extend Cady's

community caretaking exception to the warrantless search of an unlocked warehouse during a burglary investigation).

The Seventh Circuit's decision in Pichany, however, does not necessarily conflict with the decisions from other circuits cited above. Although Pichany interpreted Cady as limiting the community caretaking exception to the search of automobiles, Pichany nevertheless suggested in dicta that the search of the warehouse might have been justified had the officers entered to protect the public from potential danger, as evidenced in the following passage.

> None of the factors which the Court found characterized the community caretaking function are present here. First, the police exercised no control or dominion over the property. . . . Second, in contrast to Cady the police here were under no obligation to secure the warehouse or to preserve its contents . . . The officers did not claim to have entered the defendant's warehouse to protect themselves or the public from potential danger.

Pichany, 687 F.2d at 207.

Significantly, the Seventh Circuit more recently has upheld the brief search of a residence where officers believed the occupant might be in danger. United States v. Brown, supra, 64 F.3d 1083, 1086. There, officers were conducting a buy/bust operation that led to the arrest of Chris Johnson. Johnson agreed to "finger his source, Ty." The officers drove to the

location indicated by Johnson and eventually arrested Tyron Brown as Johnson's source. Brown, 64 F.3d at 1084.

When arrested, Johnson had been driving someone else's car. He claimed not to know the owner, but said a friend had lent the car to him. The glove compartment of the car contained a rental agreement for a different auto; the customer was Fannie Bonds, who listed her residence as Apartment 203 of an address in Brown Deer, Wisconsin. As it turned out, the apartment was located immediately to the north of where Brown was standing at the time of arrest. Brown claimed he did not live nearby, but had a key to Apartment 203. Police became concerned that Fannie Bonds might be the "victim of auto theft -- or worse." After receiving no answer, the officers unlocked the apartment and quickly checked each room. In doing so, they discovered cocaine. Brown, 64 F.3d at 1084.

The Seventh Circuit upheld the initial entry, stating: "We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams." Brown, at 1086. Because the officers had reason to fear for Bonds' safety, the court concluded that the officers could "take some steps to protect her." Brown, at 1086 (citing Murdock v. Stout, 54 F.3d 1437, 1442 (9th Cir. 1995)). While the court did not formally label the officer's actions as

"community caretaking functions," the Seventh Circuit implicitly recognized the essence of that exception by upholding the search in question.

Like the Seventh Circuit, the Ninth Circuit has also recognized the essence of the community caretaking exception, although including it within the rubric of "exigent circumstances." As pointed out by petitioner, the Ninth Circuit in Erickson interpreted Cady's community caretaking exception as confined to automobile searches and therefore declined to uphold the warrantless search of a residence under the caretaking exception. Erickson, 991 F.2D at 532. The court nevertheless recognized that a warrantless search of a residence could be justified under limited circumstances.

> Of course, to say that a police officer may not conduct a warrantless search of a residence merely because he is performing a community caretaking function does not mean that such a search may never be made. In a wide variety of contexts, this and other circuits have upheld warrantless searches conducted during burglary investigations under the rubric of exigent circumstances.[4]

Erickson, at 533 (citations omitted).

Consistent with the above passage, in a later case, the Ninth Circuit upheld the warrantless entry into a private residence under the exigent

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[4] Because the government did not challenge the district court's holding that exigent circumstances did not exist to justify the intrusion, the Ninth Circuit did not pass upon that ruling. Erickson, 991 F.2d at 533.

circumstances exception where the "police officers . . . had a fair probability that something was amiss inside the house and that a resident might be in need of assistance. Murdock v. Stout, 54 F.3d 1437, 1443 (9th Cir. 1995). The court defined exigent circumstances as:

> those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.

Murdock, 54 F.3d at 1441 (citations omitted, emphasis added). Because the Ninth Circuit's definition of exigent circumstances includes situations where officers or other persons might be in danger, the Ninth Circuit's exigent circumstances exception recognizes within it the same exception that other circuits have labeled separately as the community caretaking exception. Therefore, the Ninth circuit does not significantly depart from the other circuits.

While the decisions of the Seventh and Ninth Circuits may not say the magic words "community caretaking" exception, their holdings implicitly recognize that the exception applies outside the context of automobile searches, in appropriate limited circumstances. As a result, the only remaining circuit cited in the state's brief as representing a conflict is the Tenth Circuit. One jurisdiction, whether state or federal, however, does not

represent a conflict of sufficient import to require resolution by the United States Supreme Court. This Court should deny the writ.

3. The Constitutionality of the Community Caretaking Exception is Well-Settled and therefore not an Issue of Substantial National Importance.

Contrary to petitioner's assertion, "[t]he ability of the police to constitutionally engage in brief non-investigatory detentions of persons" is not a recurring question of substantial national importance that should be addressed by this Court. See Petition for Writ, at 14. As Cady held over twenty-five years ago, the ultimate test to be applied under such circumstances is reasonableness. Cady, 413 U.S. at 448. Whether a given stop is reasonable "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975).

As the cases in the preceding section demonstrate, the state courts and the Circuit Courts of Appeal have had little difficulty applying these principles to uphold the warrantless search or seizure of an individual under a variety of circumstances, particularly where the officer believed the individual represented a danger to himself or others. See, e.g., United States v. Rideau, supra, 949 F.2d at 720; Provo City v. Warden, supra, 844 P.2d

at 364; see also State v. Hutchison, 56 Wn. App. 863, 866, 785 P.2d 1154 (1990) (an officer may reasonably render aid and assistance to a person who is in danger and in need of help).

The Washington Supreme Court's decision in the instant case likewise recognized that a warrantless seizure to check on an individual's safety may be justified under appropriate limited circumstances. Under the circumstances presented, however, the court concluded that Kinzy's seizure was unreasonable.

Although petitioner frames the issue presented as whether the community caretaking exception extends beyond the search of automobiles, the real issue presented is whether the Washington Supreme Court majority struck the appropriate balance in the instant case. Because the police action in question suggested the enforcement of a nonexistent curfew law, the majority correctly concluded Loreal's interest was more weighty than the public's. In any event, because reasonableness must be determined on a case by case basis, whether the Washington Supreme Court struck the appropriate balance in a particular case cannot be considered an issue of national significance.

Moreover, whether the officers in the instant case were acting "in accordance with Washington's Family Reconciliation Act," as petitioner

contends, is an issue of local, not national, concern. This Court should deny the writ.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

No. 00-679

Washington,

Petitioner

v.

Loreal Monique Kinzy

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Washington, No. 68239-9.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Washington.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

January 8, 2001

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____ Deputy

Supreme Court of the United States

No. 00-679

Washington,

Petitioner

v.

Loreal Monique Kinzy

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

January 8, 2001